Supreme Court, U.S.
FILED

931489 MAR 2 2 1994

OFFICE OF THE CLERK

No. 93-

In The

Supreme Court of the United States

October Term, 1993

CAROL LOWERY, Treasurer of Cleveland County, Oklahoma; THE BOARD OF COUNTY COMMISSIONERS OF CLEVELAND COUNTY, OKLAHOMA; and DENISE HEAVNER, County Assessor of Cleveland County, Oklahoma,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

TOM A. LUCAS, OBA #5558*
JAMIE J. MCGRAW, OBA #13583
Assistant District Attorneys for
Cleveland County, Oklahoma
201 S. Jones, Suite 210
Norman, Oklahoma 73069
(405) 321-8268
Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tax Injunction Act (28 U.S.C. § 1341) deprives the Federal District Court of jurisdiction to grant declaratory and injunctive relief against local government taxing authorities in an action by Federal Deposit Insurance Corporation for such relief under 12 U.S.C. § 1825(a) and (b).

II. Whether the Tenth Circuit Court of Appeals incorrectly decided that 12 U.S.C. § 1825(b) negates 12 U.S.C. § 1825(a) and precludes enforcement of local ad valorem tax liens by involuntary sale, and permits revaluation of the property for the years prior to FDIC's ownership.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

Proceedings in the Courts Below and Basis for Federal Jurisdiction in the Court of First Instance ... 3

Facts Material to Review of the Questions Presented 5

ARGUMENT 7

QUESTION I:

WHETHER THE TAX INJUNCTION ACT (28 U.S.C. § 1341) DEPRIVES THE FEDERAL DISTRICT COURT OF JURISDICTION TO GRANT DECLARATORY AND INJUNCTIVE RELIEF AGAINST LOCAL GOVERNMENT TAXING AUTHORITIES IN AN ACTION BY FEDERAL DEPOSIT INSURANCE CORPORATION FOR SUCH RELIEF UNDER 12 U.S.C. § 1825(a) AND (b).

A. The Tax Injunction Act Is A Jurisdictional Limitation and its Application Cannot Be Waived 7

B. Section 1825(b) Does Not Create A "Subsequent Legislation" Exception to the Tax Injunction Act .. 8

TABLE OF CONTENTS – Continued

Page

QUESTION II:

WHETHER THE TENTH CIRCUIT COURT OF APPEALS INCORRECTLY DECIDED THAT 12 U.S.C. § 1825(b) NEGATES 12 U.S.C. § 1825(a) AND PRECLUDES ENFORCEMENT OF LOCAL AD VALOREM TAX LIENS BY INVOLUNTARY SALE, AND PERMITS REVALUATION OF THE PROPERTY FOR THE YEARS PRIOR TO FDIC'S OWNERSHIP.

A. The Writ Should be Granted to Resolve First Impression Question Interpreting 12 U.S.C. § 1825(a) and (b) Which Are Issues of Great Public Importance Affecting the Ability of Local Taxing Authorities Nationwide to Collect Delinquent Ad Valorem Taxes 11

B. Congress Did Not Intend Tax Revenue Represented by the Liens Attached Prior to FDIC's Ownership to be Lost Forever 12

C. Redetermination of the Value of Property For Calculation of Ad Valorem Taxes Under 12 U.S.C. § 1825(b) is Limited to the Taxing Period During FDIC's Ownership..... 14

CONCLUSION 16

APPENDIX:

Opinion of the United States Court of Appeals for the Tenth Circuit, dated December 22, 1993 ..... 1a

Order of the United States District Court for the Western District of Oklahoma dated July 20, 1992 ..... 9a

U.S. Constitution 20a

Oklahoma Constitution 21a

Statutes 30a

TABLE OF AUTHORITIES

Page

CASES

Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F.Supp. 1100 (N.D. Ill. 1988) 15

Bank of New England Old Colony v. Clark, 986 F.2d 600 (1st Cir. 1993) 8, 9, 10

California v. Grace Brethren Church, 457 U.S. 393 (1982) 7

Carrollton-Farmer Branch v. Johnson & Cravens, 858 F.2d 1010 (5th Cir. 1988) modified, 867 F.2d 1517, vacated on other grounds, 889 F.2d 571 (1980) 9

Colorado Health Care Ass'n. v. Colorado Dept. of Social Services, 842 F.2d 1158 (10th Cir. 1988) 14

Illinois Cent. R. Co. v. Howlett, 525 F.2d 178 (7th Cir. 1975) cert. denied 424 U.S. 976 (1976) 9

Irving Indep. Sch. Dist. v. Packard Properties, 970 F.2d 58 (5th Cir. 1992) 9, 10

Jenson v. U.S., 662 F.2d 664 (10th Cir. 1981) 15

Louisiana v. Mississippi, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed 913 (1906) 14

Moe v. Conf. Salish and Kootenai Tribes, 425 U.S. 463 (1976) 8

Septa v. Penn. Pub. Util. Comm., 802 F.Supp 1273 (E.D. Penn. 1992) 11

Thiokol Corporation v. Dept. of Treas. State of Mich., Revenue Division, 987 F.2d 376 (6th Cir. 1993) 11

TABLE OF AUTHORITIES – Continued

Page

Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1 (1st Cir. 1992) 7

Tully v. Griffin, 427 U.S. 68 (1976) 10

CONSTITUTION:

U.S. Const. art. IV § 3 .....3, 14

Okla. Const. art. X § 9 .....3, 16

STATUTES:

11 U.S.C. § 108 13

11 U.S.C. § 362 13

12 U.S.C. § 1819 .....3, 5, 8, 9

12 U.S.C. § 1825(a) and (b) ..... *passim*

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1341 .....2, 3, 5, 7, 8, 10

28 U.S.C. § 1345 .....3, 5, 8, 9

Okla. Stat. tit. 68 § 3101 ..... 3, 6, 12

Okla. Stat. tit. 68 § 3105 .....3, 6

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

CAROL LOWERY, Treasurer of Cleveland County, Oklahoma; THE BOARD OF COUNTY COMMISSIONERS OF CLEVELAND COUNTY, OKLAHOMA; and DENISE HEAVNER, County Assessor of Cleveland County, Oklahoma,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated December 22, 1993, on interlocutory cross-appeal is reported at 12 F.3d 995 (10th Cir. 1993) and is reproduced in the Appendix (hereinafter "App.") at 1a-7a. The judgment Order of the United States District Court for the Western District of Oklahoma, dated July 20, 1992 on cross-motions for summary

judgment is unpublished and is reproduced in App. 8a-17a.

JURISDICTION

On December 22, 1993, the Tenth Circuit Court of Appeals affirmed the judgment of the U.S. District Court for the Western District of Oklahoma which sustained Federal Deposit Insurance Corporation's motion for summary judgment and held (1) FDIC's property cannot be sold for collection of delinquent real property ad valorem taxes without its consent under 12 U.S.C. § 1825(b), the liens for which attached prior to FDIC's ownership; (2) that involuntary liens for unpaid real property ad valorem taxes may not attach to the property during FDIC's ownership; (3) FDIC is entitled to challenge, and obtain a revaluation of, the valuation of property assessed for ad valorem tax purposes accruing on its property; and (4) that FDIC is not liable for any sums in the nature of fines and penalties in connection with delinquent ad valorem taxes.

The Court of Appeals reversed the trial court's judgment that FDIC could *not* challenge, and obtain a revaluation of, the valuations for ad valorem tax purposes which accrued prior to FDIC's ownership.

It is believed that all of the issues raised and decided by the Court of Appeals are questions which have not been previously addressed by this Court.

The question of Federal court jurisdiction under 28 U.S.C. § 1341 (TIA) was not raised in the trial court and

the court of appeals declined to review supplemental briefs of all parties on this question.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Sup. Ct. R. 10 and 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following statutes are reproduced in the Appendix:

U.S. Const. art. IV § 3
Okla. Const. art. X § 9
12 U.S.C. § 1819
12 U.S.C. § 1825(a) and (b)
28 U.S.C. § 1254(1)
28 U.S.C. § 1341
28 U.S.C. § 1345
Okla. Stat. tit. 68 § 3101
Okla. Stat. tit. 68 § 3105

STATEMENT OF CASE

Proceedings in the Courts Below and Basis for Federal Jurisdiction in the Court of First Instance.

The FDIC initiated an action in the United States District Court for the Western District of Oklahoma on June 5, 1991, to enjoin Petitioners, Cleveland County, Oklahoma taxing authorities, from foreclosing tax liens attached to certain real property prior to its acquisition by FDIC, over the expressed objections of FDIC. FDIC also sought a declaratory judgment on a number of issues pertaining to real property ad valorem taxes. The District

Court entered an agreed order restraining the Cleveland County taxing authorities from disposing of FDIC's property without FDIC's consent pending further order. On July 20, 1992, the United States District Court for the Western District of Oklahoma entered its order on the cross-motions for summary judgment holding:

(1) FDIC's property cannot be sold for collection of delinquent real property ad valorem taxes without its consent, even though the liens had attached prior to FDIC's ownership;

(2) That involuntary liens for unpaid real property ad valorem taxes may not attach to the property during FDIC's ownership;

(3) FDIC is entitled to challenge, and obtain a revaluation of, the valuation of property assessed for ad valorem tax purposes accruing on its property;

(4) That FDIC could not challenge, and obtain a revaluation of, the valuations for ad valorem tax purposes which accrued prior to FDIC's ownership; and

(5) That FDIC is not liable for any sums in the nature of fines and penalties in connection with delinquent ad valorem taxes.

Thereafter, on August 28, 1992, the District Court certified its July 20, 1992, Order to the United States Court of Appeals for the Tenth Circuit. On September 28, 1992, the Court of Appeals granted the parties' timely petitions for permission to appeal, and, on December 22, 1993, the Court of Appeals rendered its opinion affirming the trial court on all issues except the trial court's judgment that FDIC could not challenge valuations for ad

valorem tax purposes which accrued prior to FDIC's ownership, and held that FDIC *could* challenge such valuations and obtain a revaluation for ad valorem tax purposes for those years prior to its acquisition of the property. Petitioner brings this Petition for Writ of Certiorari for a review of the circuit court's decision.

FDIC brought its action seeking declaratory and injunctive relief against the local taxing authorities pursuant to 12 U.S.C. § 1819 and 28 U.S.C. § 1345, although not raised in the trial court, Petitioners sought to question the jurisdiction of the trial court, and of the Tenth Circuit Court of Appeals, under the Tax Injunction Act, 28 U.S.C. § 1341, on appeal, but this brief was returned unfiled pending disposition of FDIC's motion to file a supplemental brief addressing jurisdiction, which said motion was denied at the time of oral argument. Petitioners seek to raise the question of the trial court's jurisdiction under the Tax Injunction Act in this Petition for Writ of Certiorari, in addition to the other question presented for review.

Facts Material to Review of the Questions Presented

On or about January 8, 1987, FDIC acquired substantially all the assets of an insolvent bank, including a certain promissory note executed by William J. O'Connell and Doris J. O'Connell. On or about January 15, 1990, for purposes of discharging their indebtedness to FDIC, the O'Connells executed and delivered to FDIC a general warranty deed conveying fee simple title to a 7.71 acre parcel of land in Cleveland County, Oklahoma.

On or about March 20, 1991, FDIC received a letter from Carol Lowery, Treasurer of Cleveland County, Oklahoma, advising FDIC that pursuant to 68 O.S. §§ 3101 and 3105, the property would be sold at public auction to satisfy past due and delinquent ad valorem taxes, interest and costs for the calendar years 1987 through 1990, inclusive, in the aggregate total of $31,869.39. On April 5, 1991, FDIC notified the Cleveland County Treasurer in writing that, pursuant to 12 U.S.C. § 1825(b), the premises were exempt from attachment of any involuntary lien, from sale without the consent of FDIC, and that FDIC did not consent to the sale as proposed.

On April 11, 1991, the Cleveland County District Attorney's office notified FDIC in writing that, notwithstanding their non-consent, the Cleveland County Treasurer intended to proceed with the tax sale unless taxes, interest, and costs were paid in full prior to the scheduled June 10, 1991 sale date.

FDIC filed its petition for injunctive and declaratory relief in the United States District Court for the Western District of Oklahoma on June 5, 1991, seeking to enjoin the Cleveland County taxing authorities from selling the property at public auction, and seeking a declaratory judgment on a number of issues pertaining to ad valorem taxes and an interpretation of 12 U.S.C. § 1825(a) and (b). The Cleveland County taxing authorities agreed to make no further attempts to sell the property pending the outcome of FDIC's suit.

ARGUMENT

QUESTION I: WHETHER THE TAX INJUNCTION ACT (28 U.S.C. § 1341) DEPRIVES THE FEDERAL DISTRICT COURT OF JURISDICTION TO GRANT DECLARATORY AND INJUNCTIVE RELIEF AGAINST LOCAL GOVERNMENT TAXING AUTHORITIES IN AN ACTION BY FEDERAL DEPOSIT INSURANCE CORPORATION FOR SUCH RELIEF UNDER 12 U.S.C. § 1825(a) AND (b).

A. The Tax Injunction Act Is A Jurisdictional Limitation and its Application Cannot Be Waived.

The writ should be granted first, to decide whether the Federal District Court had jurisdiction to hear FDIC's request for injunctive and declaratory relief from state-based taxes since such an action is specifically barred by the Tax Injunction Act of 1937 (hereinafter TIA) 28 U.S.C. § 1341 (See appendix 37a). Petitioners respectfully submit that the TIA prevents the Federal District Court from taking jurisdiction over this action and that this issue of jurisdiction cannot be waived by failure to raise same in the trial court.

It is well settled that the TIA is a jurisdictional act and, therefore, not subject to waiver both by its express language and by case law. *California v. Grace Brethren Church*, 457 U.S. 393, 418-19 (1982); Accord *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992).

The *Trailer Marine* court discussed the preclusive jurisdictional effect of the TIA when stating:

> [b]ecause the bar in question is 'jurisdictional' and is not subject to waiver . . . The Tax Injunction Act of 1937, 28 U.S.C. § 1341, prevents district courts, . . . from enjoining collection of 'any tax under State Law.' . . . *Id.* at 4.

B. Section 1825(b) Does Not Create A "Subsequent Legislation" Exception to the Tax Injunction Act.

As stated in *Moe v. Conf. Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the jurisdictional bar of the TIA is not defeated simply because subsequent legislation states that "all" civil actions of a certain nature automatically fall within the jurisdiction of United States District Courts. *Id.* at 472.

Here, FDIC depends upon 28 U.S.C. § 1345 to obtain district court jurisdiction in contravention of the TIA bar. The FDIC attempts to invoke the "subsequent legislation" exception to the TIA to claim that 12 U.S.C. § 1825(b) was clearly meant by Congress to circumvent the TIA, and that 12 U.S.C § 1819(b) grants the FDIC status as an agency of the United States granting exclusive federal court jurisdiction over all civil actions involving the FDIC, and, when read together with Section 1825(b), reflects "an unmistakable intent to preempt state taxing mechanisms and jurisdiction over precisely the issues presented in this case."

However, *Bank Of New England Old Colony v. Clark*, 986 F.2d 600 (1st Cir. 1993) clearly addresses the federal instrumentality exception to TIA and holds that FDIC does not qualify. *Clark* also stands for the rule that unless

subsequent legislation manifests a clear intent to override any conflicting statutes in existence then that is not the result. *Id.* at 603. The court observes that "the structure of § 1819(b) does not demonstrate a clear and manifest intent to override the Act [TIA]," *Id.*

Additionally, *Clark* holds that 12 U.S.C § 1345, upon which FDIC here depends for federal jurisdiction, is made expressly subject to the provisions of other law and Congress chose to express this in the language of Section 1345 by beginning the statute with the phrase:

> "Except as otherwise provided by Act of Congress, . . . "

These issues decided in *Clark* are pivotal to the instant jurisdictional question. Whether Section 1825(b) grants the federal court jurisdiction contrary to the clear mandate of the TIA is a threshold concern. Such a jurisdictional issue involving the TIA cannot be waived and may be raised at any point in the case. *Illinois Cent. R. Co. v. Howlett*, 525 F.2d 178 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

The FDIC's position depended in part on *Carrollton-Farmer Branch v. Johnson & Cravens*, 858 F.2d 1010 (5th Cir. 1988), modified, 867 F.2d 1517, vacated on other grounds, 889 F.2d 571 (1980), and *Irving Indep. Sch. Dist. v. Packard Properties*, 970 F.2d 58 (5th Cir. 1992) in support of its argument that other courts have upheld the granting of federal court jurisdiction over similar tax disputes.

There are distinguishing factors between *Carrollton* and *Irving* and the case at bar. First, in the former cases, the FDIC challenged Section 1341 when defending an action to enforce or collect a tax. Here the action was

brought by FDIC seeking to enjoin a tax collector. This difference is noteworthy when considering the language of Section 1341, to wit:

> "The district courts shall not enjoin, suspend or restrain . . . "

and this is what the FDIC asked the District Court to do in this instance. The *Irving* decision emphasizes the importance of this distinction when stating:

> Section 1341 does not, however, preclude federal court jurisdiction over a suit brought to *collect* a state tax rather than enjoin, suspend or restrain the collection of taxes. (emphasis added) 741 F.Supp at 122.

Additionally, the *Carrollton* court bottomed its decision on a detailed analysis of the language, now repealed, of 12 U.S.C. § 1730(k)(1) and that statute is not involved here.

Because this action frustrates the State's need to administer its own fiscal affairs and should be decided by the State court where plain, speedy and efficient relief are available, the federal district court is without jurisdiction. *Tully v. Griffin,* 429 U.S. 68 (1976)

The FDIC also claims that *Clark* is distinguishable in that it concerned State tax law questions only, unlike the instant case. This argument is disingenuous considering that the FDIC claims that the tax acting as the basis for the lien claimed by the taxing authority is inaccurately inflated pursuant to Oklahoma State law guidelines. Any revaluation will be decided under State law.

Only where the language chosen by Congress in codifying a federal law provides for exclusive federal jurisdiction are the historic concerns for state fiscal autonomy defeated. *Septa v. Penn. Pub. Util. Comm.*, 802 F.Supp 1273, 1284 (E.D. Penn. 1992). Section 1825(b) contains no such language.

"Although the TIA mentions only injunctions, its policy of comity bars declaratory judgment . . . " *Thiokol Corporation v. Dept. of Treas. State of Mich., Revenue Division*, 987 F.2d 376 (6th Cir. 1993) (deciding issue of whether TIA trumps provisions of ERISA when tax matters are involved). Only when the state court cannot grant the relief sought does the TIA yield jurisdiction to federal district courts. *Id.* at 380. Here the FDIC does not claim that it cannot obtain the injunctive and declaratory relief it seeks in State court.

QUESTION II: WHETHER THE TENTH CIRCUIT COURT OF APPEALS INCORRECTLY DECIDED THAT 12 U.S.C. § 1825(b) NEGATES 12 U.S.C. § 1825(a) AND PRECLUDES ENFORCEMENT BY INVOLUNTARY SALE, AND PERMITS REVALUATION OF THE PROPERTY FOR THE YEARS PRIOR TO FDIC'S OWNERSHIP.

A. The Writ Should be Granted to Resolve First Impression Questions Interpreting 12 U.S.C. § 1825(a) and (b) Which Are Issues of Great Public Importance Affecting the Ability of Local Taxing Authorities Nationwide to Collect Delinquent Ad Valorem Taxes.

This Court should grant certiorari and clarify the issues raised in the interlocutory appeals and cross-

motions for summary judgment which address the legal issues involving the power of local taxing authorities to enforce and collect ad valorem taxes assessed against properties prior to and after the FDIC's ownership. Because the FDIC has acquired thousands of properties nationwide, the interpretation of this statute affects local taxing authorities nationwide, thus making these questions of first impression of great public importance.

While the lower court's interpretation and application of 12 U.S.C. § 1825(b) restricts the local taxing authorities' ability to enforce the collection of tax liens, it left no direction or avenue for the collection of such liens prior to the effect of Okla. Stat. tit. 68 § 1301, which acts to extinguish liens after a seven year limitation period. In effect, the lower court is enjoining the local taxing authorities from utilizing its only method of effectively collecting valid tax liens which the County is dependent upon for budgeting purposes, thus allowing the FDIC to ignore these taxes and tax liens and allowing them to lapse past the seven year lien limitation period and become unenforceable.

B. Congress Did Not Intend Tax Revenue Represented by the Liens Attached Prior to FDIC's Ownership to be Lost Forever.

Because 68 O.S. § 3101 limits the duration of a tax lien on property in Oklahoma to seven (7) years from the date upon which the tax became due and payable, a lien not enforced within this statutory limitation period becomes invalid. Such a suspension of state actions

brought about by the temporary application of preemptive federal law appears in other areas of the law. However, where such suspension occurs, Congress has also provided protection against a loss of the state right by overriding the applicable state statute of limitations.

For example, under the automatic stay provision of 11 U.S.C. § 362, most actions normally available under state law are stayed until the automatic stay is no longer in effect. This delay would result in a loss of certain rights and remedies were it not for the extension of time granted under 11 U.S.C. § 108. Under Section 108, the fixed period for pursuing a previously stayed remedy is extended for thirty (30) days after termination or expiration of the stay, regardless of any conflicting bar against untimely actions. The federal statutory scheme preserves the suspended right. This evidences the way Congress ensures that federal and state law operate in harmony.

The scheme reflected in the bankruptcy statutes discussed above more realistically reflects how Congress ensures that federal law meshes with state law when they adopt explicitly preclusive legislation. Likewise, if the legislative intent in enacting Section 1825 were to preempt any enforcement of all *ad valorem* tax liens, most certainly Congress would have provided for protection against the loss of these liens through adoption of concomitant measures preventing the passage of time from destroying such liens while FDIC remains in ownership.

The language of Section 1825 is not conclusive on this matter; rather, it leaves room for interpretation. The statutory language does not address liens attached or assessments made prior to property becoming "[p]roperty of the Corporation." 12 U.S.C. § 1825(b)(2) in part.

The interpretation of statutes must be done so as to give effect to the legitimate intent of the legislative body enacting the same. *Colorado Health Care Ass'n. v. Colorado Dept. of Social Services*, 842 F.2d 1158 (10th Cir. 1988). Even if the intent is clear from the reading of the statute and legislative history, the statutory enactment must still be consistent with the U.S. Const. art. IV 3 and *Louisiana v. Mississippi*, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed 913 (1906).

In effect, the lower court has foreclosed the only avenue available to effectively collect unpaid and delinquent taxes which have and will continue to provide the money revenue base for local governments. The lower courts' interpretation of 1825(b)(1) and (2) will affect thousands of properties across the nation, now owned by FDIC, or to be later acquired by FDIC. Therefore, this Court should grant this Petition for Writ of Certiorari and consider the questions raised.

C. Redetermination of the Value of Property For Calculation of Ad Valorem Taxes Under 12 U.S.C. § 1825(b) is Limited to the Taxing Period During FDIC's Ownership.

The phrase within Section 1825(b)(1) that decides this issue is " . . . [n]otwithstanding the failure of any person

to challenge an assessment under state law of such property's [property of the Corporation's] value." The language of this much discussed " . . . notwithstanding . . . " clause clearly contemplates application only to valuations made during FDIC's ownership. Here the Petitioners agrees with the trial court that " . . . to hold otherwise would create interminable disruption in the tax rolls of the taxing authority by permitting FDIC to reopen tax rolls for numbers of years prior to the creation of its ownership interest. The language of the statute does not contemplate such a result." The language of Section 1825 neither specifies nor contemplates such a retroactive application of its effect.

Normally, laws cannot be retroactively applied absent a clear expression of legislative intent that this result obtain. *Jenson v. U.S.*, 662 F.2d 664 (10th Cir. 1981); See also *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100 (N.D. Ill. 1988).

Petitioners understand FDIC's mission to protect both the public and the depositors of failed financial institutions. However, FDIC should not be allowed to disrupt past local government budgets under the guise of correcting the wrongdoings of a failed bank.

Congress painted with very broad strokes in drafting Section 1825(b)(1) and the "notwithstanding" clause could arguably be read by a biased semanticist to allow revaluation of property for every tax year from the inception of Oklahoma's taxing authority until present. Public policy and common sense must be applied along with this law to prevent such an unseemly disregard for the

welfare of the beneficiaries of the *ad valorem* taxes collected. Okla. Const. art. X § 9. The interpretation of the Court of Appeals is not in harmony with the general intent of Congress. The District Court's decision on this issue was correct and should be affirmed.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and determine whether the federal courts have jurisdiction of this cause, or whether the Tax Injunction Act precludes same. In the alternative, this court should grant the Petition for Writ of Certiorari and determine whether the trial court and the court of appeals have correctly interpreted 12 U.S.C. § 1825(a) and (b) and, if not, remand the case with appropriate instructions.

Respectfully submitted,

TOM A. LUCAS, OBA #5558*
JAMIE J. MCGRAW, OBA #13583
Assistant District Attorneys for
Cleveland County, Oklahoma
201 S. Jones, Suite 210
Norman, Oklahoma 73069
(405) 321-8268
Attorneys for Petitioner

*Counsel of Record

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff - Appellant/
Cross - Appellee,

vs.

CAROL LOWERY, Treasurer of Cleveland County, State of Oklahoma; THE BOARD OF COUNTY COMMISSIONERS OF CLEVELAND COUNTY, STATE OF OKLAHOMA; DENISE HEAVNER, County Assessor of Cleveland County, Oklahoma,

Defendants - Appellees/
Cross - Appellants,

INDEPENDENT SCHOOL DISTRICT NO. 29; NORMAN PUBLIC SCHOOL,

Amici Curiae.

Nos. 92-6333
92-6336

(Filed
Dec. 22, 1993)

Appeal From the United States District Court for the
Western District of Oklahoma
(D.C. No. CIV-91-819-T)

Edward J. O'Meara, General Counsel, Federal Deposit Insurance Corporation, Washington, D.C. (Ann S. DuRoss, Assistant General Counsel and Richard J. Osterman, Jr., Senior Counsel, Federal Deposit Insurance Corporation, and Ricky V. Sonders, Edwards, Sonders & Propester, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiff-Appellant/Cross-Appellee.

Tom A. Lucas, Office of the District Attorney, Norman, Oklahoma (Reginald D. Gaston, Assistant District Attorney, on the briefs), for Defendants-Appellees/Cross-Appellants.

Robert L. Pendarvis, Crowe & Dunlevy, Luttrell, Pendarvis & Rawlinson, Norman, Oklahoma, for Amicus Curiae.

Before **MOORE, ANDERSON** and **TACHA**, Circuit Judges.

MOORE, Circuit Judge.

These interlocutory appeals raise issues concerning the legal capacity of local authorities to enforce ad valorem taxes assessed against property owned by the Federal Deposit Insurance Corporation. We are also asked to consider whether there is a limitation on the FDIC's statutory right to obtain revaluation of the property.

The district court held under 12 U.S.C. § 1825(b) local authorities could not invoke state enforcement mechanisms to collect taxes from the FDIC without its consent. The court further held although the FDIC could obtain revaluation of property it owned, that authority did not extend to valuations made in years preceding its acquisition of title.

Because of the unassailably clear language of 12 U.S.C. § 1825(b), we conclude the district court correctly interpreted the enforcement powers of local authorities but read into the statute a nonexistent limitation of the FDIC's rights. We therefore affirm in part and reverse in part.

Plaintiff FDIC was appointed receiver for Security National Bank & Trust Company. In its corporate capacity, the FDIC acquired a promissory note made by William and Doris O'Connell payable to Security. Ultimately unable to pay the note, the O'Connells offered the FDIC real estate in satisfaction of the debt.

After the FDIC acquired title, defendant Carol Lowery, Treasurer for Cleveland County, Oklahoma, notified the FDIC the property would be sold at a public auction to satisfy delinquent ad valorem taxes. The O'Connells had failed to pay taxes, interest, and costs for several years. The FDIC objected to the sale pursuant to 12 U.S.C. § 1825 which makes the FDIC's real property amenable to taxation, but limits the taxing authority's enforcement mechanisms. Ms. Lowery refused to stop the sale unless the FDIC satisfied the outstanding obligations. Consequently, the FDIC filed this action for declaratory and injunctive relief against Ms. Lowery, the Board of County

Commissioners of Cleveland County, and Denise Heavner, the County Assessor.

Following cross-motions for summary judgment, the district court decided most issues in favor of the FDIC. First, the court found 12 U.S.C. § 1825(b)(2) prohibited the County from selling the FDIC's real property without its consent.[1] Second, the court held section 1825(b)(2) barred the attachment of involuntary liens for unpaid taxes. Third, the court ruled section 1825(b)(3) did not permit taxing authorities to collect any fines or penalties from the FDIC in connection with its real property.[2] Although concluding section 1825(b)(1) authorized the FDIC to seek revaluation of its property for tax purposes, the court nevertheless denied the FDIC the right to seek revaluation of the property which had been made in years prior to the FDIC's ownership. Following the district court's ruling, the parties appealed under 28 U.S.C. § 1292(b).

The first question before us is whether the district court erred in finding the FDIC's property cannot be sold without its consent. We review the interpretation of a federal statute *de novo*. ***United States v. Walker,*** 947 F.2d 1439, 1441 (10th Cir. 1991). In its order, the district court

---

[1] The statute states: "No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation."

[2] That provision reads: The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property . . . tax . . . when due."

held to be dispositive the plain language of 12 U.S.C. § 1825(b)(2), "[n]o property of the Corporation shall be subject to . . . sale without the consent of the Corporation."[3] Thus, the court concluded the FDIC's non-consent prohibited the defendants from disposing of the property. *See Irving Indep. School Dist. v. Packard Properties*, 762 F. Supp. 699, 702 n.10 (N.D. Tex. 1991), *aff'd*, 970 F.2d 58 (5th Cir. 1992).

Defendants argue the statute contains an implied exception permitting the sale of the FDIC property when liens attached ***prior*** to the FDIC's acquisition. This contention is wholly without merit. "As in any case of statutory interpretation, we begin with the plain language of the law." *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir.), *cert. denied*, 111 S. Ct. 2803 (1991). The text of section 1825(b)(2) is unequivocal and suggests no implied exception. Further, the statute provides no involuntary lien may attach to the FDIC's property. If no lien may attach during the FDIC's ownership, the prohibition against foreclosure or sale of the FDIC's property without its consent can only refer to enforcement of liens which attached to the property before the FDIC came into title.[4]

---

[3] The district court found the statute applied to the FDIC in its corporate capacity when, as in the instant case, the corporate capacity participates in the liquidation function. Defendants do not appeal this finding. More importantly, we have held in *GWN Petroleum Corp. v. Ok-Tex Oil & Gas*, 998 F.2d 853, 856 (10th Cir. 1993), the statute is applicable to the FDIC in both its capacity as receiver and its corporate capacity.

[4] Defendants also argue the provision is constitutionally unenforceable under *Louisiana v. Mississippi*, 202 U.S. 1 (1906). Because that argument was not raised in the district court, we

Next, defendants contend the district court erred in holding section 1825(b)(2) shields the FDIC from involuntary liens. Section 1825(b)(2) explicitly states no involuntary lien may attach to the property of the FDIC. For the first time on appeal, defendants argue section 1825(b)(2) irreconcilably conflicts with the mandate of section 1825(a).[5] Once again, because the issue was not raised below, we will not address it. We note, however, section 1825(b)(2) does not excuse payment of tax by the FDIC, it simply denies authorities the ability to lien a FDIC property as a vehicle for collection of delinquent tax.

Defendants urge that we determine whether certain costs or fees are penalties prohibited by the statute. Because the district court did not have an opportunity to rule on the matter, it is improper for us to do so. This cause is interlocutory and defendants may yet raise the issue with the district court.

We turn now to section 1825(b)(1). The FDIC correctly points out section 1825(b)(1) permits it to challenge "an assessment under state law of such property's value." The district court determined the "cited exception applies only to assessments for which the property is liable during the period of the FDIC's ownership," concluding "[t]o hold otherwise would create interminable disruption in the tax rolls of the taxing authority by permitting FDIC to

---

decline to consider the issue. ***Petrini v. Howard,*** 918 F.2d 1482, 1483 n.4 (10th Cir. 1990).

[5] Section 1825(a) generally exempts the FDIC from taxation, but provides it will pay certain taxes on its real property holdings.

reopen tax rolls for numbers of years prior to the creation of the ownership interest."

We disagree. The plain language of the statute authorizes the FDIC to obtain recalculation of unpaid ad valorem taxes even if the tax liens attached before the FDIC's ownership. Title 12 U.S.C. § 1825(b) states:

> When acting as a receiver, the following provisions shall apply with respect to the Corporation:
>
> > (1) The Corporation . . . shall be subject to State . . . or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed.

The critical text is the phrase "notwithstanding the failure of ***any person*** to challenge an assessment under State law of such property's value" (emphasis added). Both sections 1825(b)(1) and (b)(3) employ the term "any person." Indisputably, "any person" in (b)(3) means those others than the FDIC. ***See Irving,*** 970 F.2d at 61-62 (any person refers to previous owners of FDIC property). Thus, it is logical the term "any person" in (b)(1) be interpreted in the same manner. ***See Estate of Cowart v. Nicklos Drilling Co.,*** 112 S.Ct. 2589, 2596 (1992). We therefore hold the FDIC is permitted to challenge assessments made before its acquisition of title.

In contrast to the district court, we perceive nothing in the plain language of the statute temporally limiting

the right of the FDIC to seek and obtain revaluation. The Congress established that right without limitation, and it is improper to judicially ingrain such a restriction on that right.

Accordingly, the judgment of the district court is AFFIRMED IN PART AND REVERSED IN PART and REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Plaintiff,	)	
v.	)	CIV-91-819-T
CAROL LOWERY, Treasurer of Cleveland County, State of Oklahoma; THE BOARD OF COUNTY COMMISSIONERS OF CLEVELAND COUNTY, STATE OF OKLAHOMA; and DENISE HEAVNER, County Assessor of Cleveland County, State of Oklahoma, Defendants.	)	(Filed July 20, 1992)

ORDER

Before the court are cross motions for summary judgment respecting all threshold legal issues identified in the special scheduling order entered previously herein.

The following statement of undisputed material facts are established:[1]

---

[1] *Defendants' Motion for summary Judgment does not set forth undisputed material facts as is required by Local Rule 14(B). Defendants have raised no objection to the statement contained in plaintiff's motion (other than characterization of the plaintiff's title conveyed – an issue not necessarily determined here). Accordingly, for purposes of determining the stipulated threshold issues, the court deems these facts, offered by plaintiff, uncontroverted and asserted as well by defendants for purposes of their "mirror" motion.*

1. On January 8, 1987, Security National Bank & Trust Company, Norman, Oklahoma ("Security"), was declared insolvent by the Comptroller of the Currency, and Federal Deposit Insurance Corporation was appointed as Security's receiver, thereby becoming vested with possession and control of the assets and affairs of said failed national banking association. (Complaint at ¶ 8; June 27 Answer at ¶ 2.)

2. In performance of a purchase and assumption transaction necessitated by the insolvency of Security, on or about January 8, 1987, FDIC acquired substantially all of the assets of Security. (Complaint at ¶ 9; June 27 Answer at ¶ 2.)

3. The assets so acquired by FDIC included, without limitation, a certain Promissory Note executed by William J. O'Connell and Doris J. O'Connell (the "O'Connells") in favor of Security (the "O'Connell Note"). (Complaint at ¶ 10; Answer at ¶ 2.)

4. On or about January 15, 1990, and for the purpose of discharging their indebtedness to FDIC (which included, without limitation, the O'Connell Note), the O'Connells executed and delivered to FDIC a general warranty deed (the "Deed") conveying to FDIC fee simple to the following parcel of real property situated in the City of Norman, Cleveland County, State of Oklahoma:

> The North Half (N/2) of Block Four (4) in COLONIAL ESTATES NO. 6 SECTION 1 ADDITION to the City of Norman, Cleveland County, Oklahoma, according to the recorded plat thereof (the "Premises").

(Complaint at ¶ 11; June 27 Answer at ¶ 2.)

5. A true copy of the Deed is attached as Exhibit "A" to FDIC's June 5, 1991 Complaint. (Complaint at ¶ 12; June 27 Answer at ¶ 2.)

6. The Deed was recorded on March 28, 1990 in Book 2222 at Page 602 in the office of the Cleveland County, State of Oklahoma. (Complaint at ¶ 14; June 27 Answer at ¶ 2.)

7. The Premises consist of 7.71 acres located at the intersection of Beaumont Drive and Peppertree Place, Norman, Oklahoma. (Complaint at ¶ 14; June 27 Answer at ¶ 2.)

8. There are no improvements on the Premises. (Complaint at ¶ 15; June 27 Answer at ¶ 2.)

9. On or about March 20, 1991, FDIC received a letter dated March 19, 1991 (the "Notice Letter") from the Cleveland County Treasurer, advising FDIC that the Premises would be sold at public auction on June 10, 1991 at 9:00 o'clock a.m. to satisfy past due ad valorem taxes, interest and costs for the calendar years 1987 through 1990, inclusive, which in the aggregate totaled $31,869.39 calculated through April 15, 1991. A copy of the Notice Letter is attached as Exhibit "B" to FDIC's June 5, 1991 Complaint. (Complaint at ¶ 17; June 27 Answer at ¶ 4.)

10. On April 5, 1991, FDIC notified the Cleveland County Treasurer in writing (the "Non-Consent Letter") that pursuant to 12 U.S.C. § 1825(b), the Premises were exempt from attachment of any involuntary lien, and from sale, without the consent of FDIC; that FDIC did not consent to the June 10, 1991 tax sale of the Premises and the FDIC requested the Premises to be withdrawn from

the June 10, 1991 auction. A copy of the Non-Consent Letter is attached as Exhibit "C" to FDIC's June 5, 1991 Complaint. (Complaint at ¶ 18; June 27 Answer at ¶ 4.)

11. On April 11, 1991, the Cleveland County District Attorney notified FDIC in writing (the "Response Letter") that notwithstanding the Non-Consent Letter, the Cleveland County Treasurer intended to proceed with the tax sale of the Premises unless taxes, interest and costs were paid in full prior to the scheduled June 10, 1991 sale date. A copy of the Response Letter is attached as Exhibit "D" to FDIC's June 5, 1991 Complaint. (Complaint at ¶ 19; June 27 Answer at ¶ 4.)

Based on these undisputed facts, the parties have mutually identified four threshold legal issues to be determined. They are as follows:

I. Whether the property of FDIC may be sold by public auction or other disposition by the Cleveland County defendants by reason of delinquent real property ad valorem taxes, without FDIC's consent to such disposition;

II. Whether involuntary liens for unpaid real property ad valorem taxes may attach to the property of FDIC, during the period of FDIC's ownership of the property;

III.A. Whether FDIC is entitled to challenge, and obtain a redetermination of, the valuation of property now owned by FDIC assessed for real property ad valorem purposes, notwithstanding that no person has challenged such assessed value under state law;

B. If so, whether FDIC is entitled to a recalculation of the real property ad valorem taxes accrued and accruing upon its property, based upon such redetermination of the valuation of the property; and

IV. Whether the Cleveland County defendants may collect any amount from FDIC in connection with the said real property that is in the nature of a fine or penalty.

Summary judgment is authorized if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P. There being no material factual controversies presented, the court addresses each issue for determination *infra*.

I. May the property of FDIC be sold by public auction or other disposition by the Cleveland County defendants by reason of delinquent real property ad valorem taxes, without FDIC's consent to such disposition?

Statutory language that is dispositive on this issue is found in 12 U.S.C. § 1825(b)(2), enacted August 9, 1989. It states:

(b) Other exemptions

When acting as a receiver, the following provisions shall apply with respect to the Corporation:

(1) . . .

> (2) No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation.

The first question raised by defendants is whether section 1825(b) applies at all since, in this instance, FDIC is not acting as receiver. However, FDIC points out that 12 U.S.C. § 1823(d)(3)(A) provides that "[w]ith respect to any asset acquired or liability assumed pursuant to this section,[2] the Corporation shall have all of the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title. Accordingly, the court finds that 12 U.S.C. § 1825(b) is applicable under these facts.

Next, the defendants argue that section 1825(b) is not pertinent, since tax liens existed on the property prior to FDIC's acquisition of the property on January 15, 1990. Further, it is pointed out that a portion of the liens to be satisfied through the proposed forced sale attached prior to FIRREA's enactment on August 9, 1989. The argument is not persuasive. Section 1825(b)(2) clearly relates to **enforceability** of tax assessments against real property owned by FDIC. There is no language limiting the no-sale

---

[2] *Defendants also argue that the real property was not acquired "pursuant to this section." 12 U.S.C. § 1823(d)(3)(A). However, the argument lacks any merit. The real property was acquired by FDIC in its corporate capacity in satisfaction of indebtedness evidenced by a promissory note that was acquired by FDIC as receiver "pursuant to this section." 12 U.S.C. § 1823(d)(3)(A). Thus, section 1825(b) contains the applicable waiver of immunity.*

provision absent FDIC's consent, and this is irrespective of when the lien attached.

The court concludes that FDIC's non-consent prohibits the defendants from disposition of the property. *See Irving Indep. School Dist. v. Packard Properties*, 762 F. Supp. 699, 702 n. 10 (N.D. Tex. 1991) ("[The taxing authorities acknowledged] that § 1825(b)(2) prohibits them from foreclosing their liens while the FDIC owns the property" in a case involving both pre- and post-FIRREA tax liens claims); *Fort Bend County Mun. Utility Dist. No. 30 v. Gayle*, 755 F. Supp. 746, 748 (S.D. Tex. 1990) (Foreclosure of pre- and post-FIRREA tax liens, absent FDIC's consent, was not authorized under the provisions of 12 U.S.C. § 1825(b).).

The first question presented is, accordingly, answered in the negative. FDIC's real property may not be sold by reason of delinquent real property ad valorem taxes without its consent.

II. May involuntary liens for unpaid real property ad valorem taxes attach to the property of FDIC during the period of FDIC's ownership of the property?

As stated previously, FDIC acquired the property on January 15, 1990, and maintains its ownership to date. FDIC states that the lien for taxes attributable to the property for 1990 would not, under Oklahoma law, attach until November 1, 1990 – 11 months after FDIC's acquisition of the property. *See* Plaintiff's Objection to Defendants' Motion for Summary Judgment. Nevertheless, liability for the 1990 assessment arose prior to FDIC's

acquisition of the property. *See United States v. Oklahoma Natural Gas Company*, 285 F.2d 333, 336 (10th Cir. 1960) ("But liability of real property for ad valorem taxes arises on January 1."). FDIC does not dispute that liens for tax years 1987, 1988, and 1989 attached, and did so prior to its acquisition of the property[3] Rather, FDIC seeks a declaration that no liens attach as to tax year 1990 and thereafter during FDIC's ownership.

The court concludes that FDIC's interpretation of subsection (b) is the correct one. 12 U.S.C. § 1825(b)(1) provides:

> (1) The Corporation including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation imposed by any state, county, municipality, or local taxing authority, except that *any real property of the Corporation shall be subject to state, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed*, except that, notwithstanding the failure of any person to challenge an assessment under state law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed. (emphasis supplied)

Therefore, under subsection (b)(1), the property is clearly taxable for ad valorem purposes. Subsection

---

[3] *See Irving Indep. School Dist. v. Packard Properties*, 762 F. Supp. 699, 703 (N.D. Tex. 1991) (*"But as in the case of other assets it acquires upon the failure of a financial institution – . . . the FDIC takes each asset in its burdened condition."*).

(b)(2), *supra* at p. 5, however, denies to the taxing authority the ability to place a lien on the property itself as a vehicle for collection of the tax should it become delinquent. FDIC cites *Irving Indep. School Distr. v. Packard Properties*, 762 F. Supp. at 703, for the proposition that section 1825(b)(2) "grants the FDIC as receiver a safe harbor against involuntary tax and other liens while it holds property." The court agrees that this is the import of the plain language of subsection (b)(2) of 12 U.S.C. § 1825.

Accordingly, the second question propounded is answered in the negative. Involuntary liens for unpaid real property ad valorem taxes may not attach to the property of FDIC during the period of FDIC's ownership.

III.A. Is FDIC entitled to challenge, and obtain a redetermination of, the valuation of property now owned by FDIC assessed for real property ad valorem purposes, notwithstanding that no person has challenged such assessed value under state law?

FDIC argues that section 1825(b)(1) permits FDIC to challenge the ad valorem assessments against the property presently due and owing for tax years 1987 through 1990. The court disagrees in part. The statute states in pertinent part:

> [A]ny real property *of the Corporation* shall be subject to state, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under state law of

> such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed. (emphasis supplied)

As previously mentioned, FDIC "takes each asset in its burdened condition." *Id.* at 703. The court determines that the cited exception applies only to assessments for which the property is liable during the period of FDIC's ownership. To hold otherwise would create interminable disruption in the tax rolls of the taxing authority by permitting FDIC to reopen tax rolls for numbers of years prior to the creation of its ownership interest. The language of the statute does not contemplate such a result. As subsection (b)(1) states, only "real property of the Corporation" is subject to taxation according to its value. Prior tax liens which had attached during another's ownership may burden the property at the time of FDIC's acquisition, but they are not equivalent to taxation of "real property of the corporation." 12 U.S.C. § 1825(b)(1).

Accordingly, the question is answered in the affirmative, limited to assessments for which the property is liable during the period of FDIC's ownership. That is to say, subsection (b)(1) does not apply to assessments made as to property upon which liens attached prior to FDIC's ownership, i.e., for tax years 1987, 1988 and 1989.

III.B. If so, is FDIC entitled to a recalculation of the real property ad valorem taxes accrued and accruing upon its property based upon such redetermination of the valuation of the property:

If an assessment "as of the period for which such tax is imposed" is successfully challenged pursuant to 12

U.S.C. § 1825(b)(1), it is mandated that such a recalculation would occur, since the waiver of sovereign immunity is limited to taxation of the FDIC property upon "such value." The question is answered in the affirmative.

IV. May the Cleveland County defendants collect any amount from FDIC in connection with the said real property that is in the nature of a fine or penalty?

12 U.S.C. § 1825(b)(3) clearly states:

> (3) The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

Unequivocally, such is prohibited during the period of FDIC's ownership of the property. The question is, accordingly, answered in the negative.[4]

The cross motions for partial summary judgment are determined in favor of FDIC, with the exception of the court's determination that challenge to assessments is limited to assessments for which the property is liable during the period of FDIC's ownership.

IT IS SO ORDERED this 20th day of July, 1992.

/s/ Ralph Thompson
UNITED STATES DISTRICT JUDGE

---

[4] *The court would deem fees assessed with respect to the unauthorized attempt to sell the property uncollectible hereunder.*

U.S. Const. art. IV § 3 provides:

> §3. Admission of new states; power over territory and other property.
>
> Section 3. New States may be admitted by the Congress into this Union; but no new state shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

OKLAHOMA CONSTITUTION, Art. 10

§ 9. Amount of ad valorem tax

Proposed amendment, designated as State Question No. 659, Legislative Referendum No. 295, to be submitted to the people at a statewide special election

(a) Except as herein otherwise provided, the total taxes for all purposes on an ad valorem basis shall not exceed, in any taxable year, fifteen (15) mills on the dollar, no less than five (5) mills of which is hereby apportioned for school district purposes, the remainder to be apportioned between county, city, town and school district, by the County Excise Board, until such time as a regular apportionment thereof is otherwise provided for by the Legislature.

No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes.

(b) A tax of four (4) mills on the dollar valuation of all taxable property in the county shall be levied annually in each county of the State for school purposes and, until otherwise provided by law, the proceeds thereof shall be apportioned to the school districts of the county by the County Treasurer on the basis of the legal average daily attendance for the preceding school year as certified by the State Board of Education. Provided that in case a school district lies in more than one county, such district shall be deemed a school district of the county having the greater part of the area comprising such district, unless otherwise provided by law, and shall be entitled to participate in the proceeds of such tax on the same basis as

districts lying wholly within such county but revenue from such tax on the same basis as districts lying wholly within such county but revenue from such tax on the assessed valuation of the district in other counties shall, when collected, be transmitted to the County Treasurer of such county having the greater part of the area comprising the district, unless otherwise provided by law, and be apportioned as hereinbefore provided for the proceeds of such tax on the assessed valuation of such county. Not to exceed seventy-five per centum (75%) of the amount received by a school district from the proceeds of such county levy in any years shall be required to finance the State guaranteed program of such district.

(c) Upon certification of a need therefor by the board of education of any school district an additional tax of not to exceed fifteen (15) mills on the dollar valuation of all taxable property in the district shall be levied for the benefit of the schools of such district.

(d) In addition to the levies hereinbefore authorized, any school district may make an emergency levy for the benefit of the schools of such district, in an amount not to exceed five (5) mills on the dollar valuation of the taxable property in such district when approved by a majority of the electors of the district voting on the question at an election called for such purpose. This levy, when approved, shall be made each fiscal year thereafter until repealed by a majority of the electors of the school district voting on the question at an election called for that purpose.

(d-1) In addition to the levies hereinbefore authorized, any school district may make a local support levy

for the benefit of the schools of such district, in an amount not to exceed ten (10) mills on the dollar valuation of the taxable property in such district, when approved by a majority of the electors voting on said question at an election called for such purpose. This levy, when approved, shall be made each fiscal year thereafter until repealed by a majority of the electors of the school district voting on the question at an election called for that purpose.

(e) The amount of revenue from school district ad valorem taxes levied under (a) and (e) of this Section which any school district may be required to use to finance its State guaranteed program shall not be in excess of its share, based upon its relative taxpaying ability as may be defined by law, of an amount equivalent to the net proceeds from a fifteen (15) mill tax levy on the aggregate net assessed valuation of the State; but until such relative taxpaying ability is defined by the Legislature, the amount of revenue from such taxes which any school district may be required to use to finance its State guaranteed program shall not be in excess of the net proceeds from an ad valorem tax levy of fifteen (15) mills on the dollar net assessed valuation of the district. No part of the proceeds from any ad valorem levy for emergency levy and local support levy under (d) and (d-1) of this Section shall be required to finance the State guaranteed program of such district.

Nothing in the amendments to the Constitution incorporated herein shall be construed to amend, alter or supersede the present application of Article XII-A. Sections 1 and 2 of the Oklahoma Constitution.

(f) If approved by the people, the amendment to this section shall apply to any levy approved, pursuant to (d) and (d-1) of this section, on or after February 8, 1994.

For tax effective pending submission of State Question No. 659, Legislative Referendum No. 295 to the people, see Art. 10, § 9, main volume

---

OKLAHOMA CONSTITUTION, Art. 10

§ 9. Amount of ad valorem tax

(a) Except as herein otherwise provided, that total taxes for all purposes on an ad valorem basis shall not exceed, in any taxable year, fifteen (15) mills on the dollar, no less than five (5) mills of which is hereby apportioned for school district purposes, the remainder to be apportioned between county, city, town and school district, by the County Excise Board, until such time as a regular apportionment thereof is otherwise provided for by the Legislature.

No ad valorem tax shall be levied for State purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes.

(b) A tax of four (4) mills on the dollar valuation of all taxable property in the county shall be levied annually in each county of the State for school purposes and, until otherwise provided by law, the proceeds thereof shall be apportioned to the school districts of the county by the County Treasurer on the basis of the legal average daily attendance for the preceding school year as certified by the State Board of Education. Provided that in case a school district lies in more than one county, such district shall be deemed a school district of the county having the greater part of the area comprising such district, unless otherwise provided by law, and shall be entitled to participate in the proceeds of such tax on the same basis as districts lying wholly within such county but revenue from such tax on the assessed valuation of the district in other counties shall, when collected, be transmitted to the

County Treasurer of such county having the greater part of the area comprising the district, unless otherwise provided by law, and be apportioned as hereinbefore provided for the proceeds of such tax on the assessed valuation of such county. Not to exceed seventy-five per centum (75%) of the amount received by a school district from the proceeds of such county levy in any year shall be required to finance the State guaranteed program of such district.

(c) Upon certification of a need therefor by the board of education of any school district an additional tax of not to exceed fifteen (15) mills on the dollar valuation of all taxable property in the district shall be levied for the benefit of the schools of such district.

(d) In addition to the levies hereinabove authorized, any school district may make an emergency levy for the benefit of the schools of such district, in an amount not to exceed five (5) mills on the dollar valuation of the taxable property in such district when approved by a majority of the electors of the district voting on the question at an election called for such purpose. This emergency levy shall provide only sufficient additional revenue to meet the needs of the district each fiscal year as determined by the board of such district and must be approved by a majority of the electors voting on said question at such an election for each fiscal year.

(d-1) In addition to the levies hereinbefore authorized, any school district may make a local support levy for the benefit of the schools of such district, in an amount not to exceed ten (10) mills on the dollar valuation of the taxable property in such district, when

approved by a majority of the ad valorem taxpaying voters voting on said question at an election for each fiscal year called for such purposes. This local support levy shall provide only sufficient additional revenue to meet the needs of the district for each such fiscal year as determined by the board of such district; provided, an elector desiring to vote upon such local support levy must present an ad valorem tax receipt for the year immediately preceding before being issued a ballot, or sign a sworn affidavit certifying the fact of such payment.

(e) The amount of revenue from school district ad valorem taxes levied under (a) and (c) of this Section which any school district may be required to use to finance its State guaranteed program shall not be in excess of its share, based upon its relative taxpaying ability as may be defined by law, of an amount equivalent to the net proceeds from a fifteen (15) mill tax levy on the aggregate net assessed valuation of the State; but until such relative taxpaying ability is defined by the Legislature, the amount of revenue from such taxes which any school district may be required to use to finance its State guaranteed program shall not be in excess of the net proceeds from an ad valorem tax levy of fifteen (15) mills on the dollar net assessed valuation of the district. No part of the proceeds from any ad valorem levy for emergency levy and local support levy under (d) and (d-1) of this Section shall be required to finance the State guaranteed program of such district.

Nothing in the amendments to the Constitution incorporated herein shall be construed to amend, alter or supersede the present application of Article XII-A, Sections 1 and 2 of the Oklahoma Constitution.

(f) Should the amendment contained in subsection (d-1) hereof be adopted on September 14, 1965, the school board of any school district in the State may within ten (10) days thereafter file with the Excise Board of the county a supplemental estimate of needs and call a special election within fifteen (15) days after such call upon the new local support levy or emergency levy if not previously submitted, or both. The school board shall advertise notice of such election by publication in at least one issue of a newspaper having general circulation in the school district, or by posting in five public places in the district at least five (5) days before such election. Should the electors of the school district vote such additional levy in such election, the County Excise Board shall forthwith compute the levy and certify appropriations for all affected school districts and refile the budgets with the County Clerk and with the State Auditor. Notice of the filing of said budget shall be given as required by law. The forty (40) day protest period shall begin immediately upon the filing of said budgets.

For the fiscal year 1965-66, the Excise Board of each county shall not finally compute the levy nor certify the appropriations for the school districts of the State until after the school district shall have had the opportunity to hold a special election as provided herein.

Temporary appropriations, up to forty per centum (40%) of the estimated funds needed by the school board of any district in the State for the fiscal year 1965-66, may be approved any time after the beginning of such fiscal year.

Upon the computation of the levy and certification of appropriations by the Excise Board, the County Assessor shall prepare or revise the tax rolls and deliver the same to the County Treasurer who shall proceed with the collection of the taxes as required by law.

Should it become necessary, because of the delay in computing levies and certifying appropriations as herein provided, the Governor may, by executive order, extend the time when taxes will be delinquent for the year of 1965, and that year only. Such extension of time shall be for the minimum time necessary to permit the County Assessor and County Treasurer to perform their duties as required by law.

Amended by State Question No. 185, Referendum Petition No. 61, adopted at election held Aug. 15, 1933; State Question No. 319, Referendum Petition No. 91, adopted at election held July 2, 1946; State Question No. 314, Initiative Petition No. 224, adopted at election held Nov. 5, 1946; State Question No. 316, Initiative Petition No. 226, adopted at election held Nov. 5, 1946; State Question No. 327, Referendum Petition No. 92, adopted at election held July 6, 1948; State Question No. 368, Referendum Petition No. 109, adopted at election held April 5, 1955; State Question No. 430, Referendum Petition No. 151, adopted at election held Sept. 14, 1965.

12 U.S.C. § 1819. Corporate powers

(a) In general

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power –

First. To adopt and use a corporate seal.

Second. To have succession until dissolved by an Act of Congress.

Third. To make contracts.

Fourth. To sue and be sued, and complain and defend, in any court of law or equity, State of Federal.

Fifth. To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. Nothing in this chapter or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof.

Sixth. To prescribe, by its Board of Directors, bylaws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its Board of Directors, or duly authorized officers or agents, all powers specifically granted by the provisions of

this chapter, and such incidental powers as shall be necessary to carry out the powers so granted.

Eighth. To make examinations of and to require information and reports from depository institutions, as provided in this chapter.

Ninth. To act as receiver.

Tenth. To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter or of any other law which it has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency).

(b) Agency Authority

(1) Status

The Corporation, in any capacity, shall be an agency of the United States for purposes of section 1345 of Title 28, without regard to whether the Corporation commenced the action.

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or

security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

(C) Appeal of remand

The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions

Except as provided in subparagraph (E), any action –

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

(E) Rule of construction

Subparagraph (D) shall not be construed as limiting the right of the Corporation to invoke the jurisdiction of any United States district court in any action described in such subparagraph if the institution of which the Corporation has been appointed receiver could have invoked the jurisdiction of such court.

(3) Service of process

The Board of Directors shall designate agents upon whom service of process may be made in any State, territory, or jurisdiction in which any insured depository institution is located.

(4) Bonds or fees

The Corporation shall not be required to post any bond to pursue any appeal and shall not be subject to payments of any filing fees in United States district courts or courts of appeal.

12 U.S.C. § 1825. Exemption from taxation; limitations on borrowing

(a) General rule

All notes, debentures, bonds, or other such obligations issued by the Corporation shall be exempt, both as to principal and interest, from all taxation (except estate and inheritance taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority: *Provided*, That interest upon or any income from any such obligations and gain from the sale or other disposition of such obligations shall not have any exemption, as such, and loss from the sale or other disposition of such obligations shall not have any special treatment, as such, under the Internal Revenue Code, or laws amendatory or supplementary thereto. The Corporation, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation now or hereafter imposed by the United States by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

(b) Other exemptions

When acting as a receiver, the following provisions shall apply with respect to the Corporation:

> (1) The Corporation including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation

imposed by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed, except that, notwithstanding the failure of any person to challenge an assessment under State law of such property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed.

(2) No property of the Corporation shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation.

(3) The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

This subsection shall not apply with respect to any tax imposed (or other amount arising) under Title 26.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Okla. Stat. tit. 68 § 3101. Tax lien on real property

Taxes upon real property are hereby made a lien for seven (7) years from the date upon which such tax became due and payable.

Okla. Stat. tit. 68 § 3105. Real property to be sold for delinquent taxes and special assessments

The county treasurer shall in all cases where taxes are a lien upon real property and are unpaid on the first day of April of any year proceed, as hereinafter provided, to advertise and sell such real estate for such taxes, special assessments and costs, and shall not be bound before so doing to proceed to collect by sale all personal taxes on personal property which are by this Code made a lien on realty, but shall include such personal tax with that due on the realty, and shall sell the realty for all of said taxes and special assessments.

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1489

In the Supreme Court of the United States

OCTOBER TERM, 1993

CAROL LOWERY, ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DOUGLAS H. JONES
Acting General Counsel
ANN S. DUROSS
Assistant General Counsel
RICHARD J. OSTERMAN, JR.
EDWARD J. O'MEARA
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether the Tax Injunction Act, 28 U.S.C. 1341, bars a federal district court from granting injunctive and declaratory relief to the Federal Deposit Insurance Corporation (FDIC) against activities of local taxing authorities that are preempted by 12 U.S.C. 1825(b) (Supp. IV 1992).

2. Whether 12 U.S.C. 1825(b)(2) (Supp. IV 1992) prohibits local taxing authorities from conducting an involuntary foreclosure sale to collect ad valorem taxes from real property owned by the FDIC.

3. Whether 12 U.S.C. 1825(b)(1) (Supp. IV 1992) grants the FDIC the right to challenge property valuations that are used to assess ad valorem taxes against property owned by the FDIC if the valuations are made before the FDIC acquires the property in question.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	4
Landgraf v. *USI Film Products*, No. 92-757 (Apr. 26, (1994)	7
Matagorda County v. *Law*, No. 92-7756 (5th Cir. Apr. 21, 1994)	5
Morgan Stanley & Company v. *Pacific Mutual Life Insurance Company*, cert. granted, 114 S. Ct. 680 (1994) (No. 93-609)	6-7
Saudi Arabia v. *Nelson*, 113 S. Ct. 1471 (1993)	8

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	6
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183:	
§ 212:	
103 Stat. 224-225 (12 U.S.C. 1821(c)(6)(B) (Supp. IV 1992))	7
103 Stat. 232 (12 U.S.C. 1821(d)(13)(A) (Supp. IV 1992))	7
§ 219, 103 Stat. 261-262	7
12 U.S.C. 1825(a) (Supp. IV 1992)	5
12 U.S.C. 1825(b) (Supp. IV 1992)	4, 7
12 U.S.C. 1825(b)(1) (Supp. IV 1992)	3, 5, 6
12 U.S.C. 1825(b)(2) (Supp. IV 1992)	2, 3, 4
12 U.S.C. 1825(b)(3) (Supp. IV 1992)	2-3
Tax Injunction Act, 28 U.S.C. 1341	7
28 U.S.C. 1292(b)	3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1489

CAROL LOWERY, ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 12 F.3d 995. The opinion of the district court (Pet. App. 9a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1993. The petition for a writ of certiorari was filed on March 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1987, the Comptroller of the Currency declared Security National Bank & Trust Company to be insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. In connection with a sale by the receiver of the operating assets of Security to a third party, the FDIC in its corporate capacity acquired a promissory note executed by William J. O'Connell and Doris J. O'Connell. Because the O'Connells were unable to repay the indebtedness described in the note, in January of 1990 they conveyed to the FDIC a parcel of land located in Cleveland County, Oklahoma. In March of 1991, petitioner Lowery notified the FDIC that she planned to sell the parcel at a foreclosure sale to satisfy unpaid ad valorem taxes for 1987 through 1990. See Pet. App. 3a, 10a-11a.

2. The FDIC then commenced this action in the United States District Court for the Western District of Oklahoma, seeking injunctive and declaratory relief to prevent the sale. The district court issued an opinion resolving the principal legal questions presented by cross-motions for summary judgment. Pet. App. 9a-19a. First, the district court concluded that 12 U.S.C. 1825(b)(2) (Supp. IV 1992) does not permit petitioners to conduct an involuntary sale of property owned by the FDIC to satisfy ad valorem taxes. Pet. App. 13a-15a. Second, the court concluded that the same provision prevents liens to secure payment of taxes from attaching to property while the FDIC owns it. *Id.* at 15a-17a. Third, the court concluded that the FDIC is entitled to obtain a redetermination of the valuation on which the taxation was based, except with respect to the valuations for years before the FDIC acquired the property. *Id.* at 17a-19a. Finally, the court concluded that 12 U.S.C.

1825(b)(3) (Supp. IV 1992) prohibits petitioners from assessing fines or penalties based on the failure of the FDIC or the prior owners to pay the taxes in a timely manner. Pet. App. 19a.

The district court granted motions by both petitioners and the FDIC authorizing an interlocutory appeal under 28 U.S.C. 1292(b). Docket Entries 36 (Aug. 28, 1992), 37 (Sept. 4, 1992). On September 28, 1992, the court of appeals granted permission to the parties to pursue the interlocutory appeals. C.A. App. 148-149.

3. The court of appeals rejected petitioners' appeal, but reversed the portion of the district court's ruling challenged by the FDIC. Pet. App. 1a-8a. First, the court of appeals agreed (*id.* at 4a-5a) that 12 U.S.C. 1825(b)(2) (Supp. IV 1992) prohibits any sale of the FDIC's property without its consent, explaining that "[t]he text of [S]ection 1825(b)(2) is unequivocal and suggests no implied exception." Pet. App. 5a. The court also agreed with the district court's holding that Section 1825(b)(2) "shields the FDIC from involuntary liens," stating that the statute "explicitly" requires that result. Pet. App. 6a. Finally, the court concluded that Section 1825(b)(1) allows the FDIC to challenge ad valorem tax assessments. Pet. App. 6a-8a. The court rejected the district court's conclusion that there is an implied exception that bars challenges to assessments made before the FDIC acquired the property, stating that "we perceive nothing in the plain language of the statute temporally limiting the right of the FDIC to seek and obtain revaluation." *Id.* at 7a-8a.

ARGUMENT

1. Petitioners first argue (Pet. 7-11) that the relief issued by the district court violates the Tax Injunction Act, 28 U.S.C. 1341. That question is not properly before

this Court. It was not included in the questions presented to the court of appeals for interlocutory review.[1] The court of appeals thus had no occasion to consider it. The question is jurisdictional, and accordingly the district court remains free to consider it on remand. There is no reason for this Court to depart from its settled practice of declining to review questions not decided by the courts below. *E.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

2. Petitioners also ask the Court to resolve two questions of "first impression" (Pet. 11) regarding the application of 12 U.S.C. 1825(b) (Supp. IV 1992) to state ad valorem taxes. Pet. 11-16. In neither case do petitioners offer a substantial basis for doubting the correctness of the court of appeals' application of the statute.

a. First, petitioners argue (Pet. 12-14) that the lower courts erred in concluding that petitioners cannot sell the FDIC's property without its consent as a means of collecting ad valorem taxes assessed against that property. As the court of appeals recognized, the main obstacle to that argument is the statutory language, which provides: "No property of the [FDIC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [FDIC], nor shall any involuntary lien attach to the property of the [FDIC]." 12 U.S.C. 1825(b)(2) (Supp. IV 1992). The language refers expressly to "foreclosure" and uses mandatory terms to

---

[1] The Petition for Permission To Appeal Pursuant To 28 U.S.C. § 1292(b) that petitioners filed in the court of appeals seeks review only of the questions decided by the district court. See *id.* at 8-9. By orders dated November 5, 1993, and November 10, 1993, the court of appeals denied motions of the parties to file supplemental briefs addressing the Tax Injunction Act.

prohibit any exercise of the listed remedies "without the consent of the [FDIC]." *Ibid.*

Petitioners offer no interpretation of the language that would permit the foreclosure at issue in this case, but simply state that application of the plain language of the statute would make it unacceptably difficult for local taxing authorities to collect ad valorem taxes from property owned by the FDIC. Arguments about the difficulties imposed by the statute, however, are properly addressed to Congress, not the federal courts. In addition, petitioners exaggerate the burdens imposed by the statute. First, the statute only bars exercise of the listed remedies while the FDIC owns the property; after the FDIC sells the property, petitioners would be free to exercise any rights accruing under state law with respect to which liens had attached before the FDIC acquired the property. Similarly, because Sections 1825(a) and (b)(1) make property of the FDIC subject to ad valorem taxes "to the same extent * * * as other real property is taxed," nothing in the statute prevents local authorities from pursuing remedies other than foreclosure (and the other remedies barred by the statute) to collect the taxes. See *Matagorda County* v. *Law*, No. 92-7756 (5th Cir. Apr. 21, 1994), slip op. 3687, 3697 ("[Section 1825 does not] prevent the Taxing Units pursuing collection of their personal judgment against the [previous] landowner."). Petitioners' desire to use the particular remedies that Congress has prohibited is not a basis for ignoring the statutory language.

b. Petitioners also challenge (Pet. 14-16) the court of appeals' interpretation of the provision of Section 1825(b)(1) regarding redetermination of ad valorem tax valuations. Petitioners no longer challenge the conclusion of the lower courts that the last clause of that provision permits the FDIC to seek a redetermination of

valuations used to assess taxes against its property; rather, they limit their claim in this Court to the proposition that the FDIC can seek such a redetermination only if the valuation is made while the FDIC owns the property.

The language enacted by Congress rebuts petitioners' argument. The statute provides: "[N]otwithstanding the failure of any person to challenge an assessment under State law of [the] property's value, such value, and the tax thereon, shall be determined as of the period for which such tax is imposed." 12 U.S.C. 1825(b)(1) (Supp. IV 1992). As the court of appeals noted (Pet. App. 7a), nothing in the statute supports a "tempora[l] limi[t]" on the right of the FDIC to challenge valuations. Furthermore, the reference to "any person"—rather than to the "Corporation"—makes clear that the provision governs valuations that are made before the FDIC acquires the property, because the only occasion on which it would be relevant that "any person" other than the FDIC failed to challenge a valuation would be a situation in which the period for challenging the valuation ran before the FDIC acquired the property. Hence, the statute strongly suggests that the FDIC is entitled to challenge valuations made at any time, whether or not the FDIC's challenge is timely as a matter of state law.

Finally, there is no merit in petitioners' suggestion (Pet. 15) that the court of appeals' application of the statute constitutes an impermissibly retroactive interpretation of an ambiguous statute.[2] The provision

---

[2] Petitioners do not argue in this Court that the Due Process Clause prohibits application of the statute in accordance with its terms. There is therefore no reason to hold the petition for *Morgan Stanley & Company* v. *Pacific Mutual Life Insurance*

in question does not "attac[h] new legal consequences to events completed before its enactment." Application of it to allow the FDIC to institute challenges after passage of the provision thus does not constitute the type of retrospective application to which the presumption against retroactive interpretations is applicable. *Landgraf* v. *USI Film Products*, No. 92-757 (Apr. 26, 1994), slip op. 25. The challenged provision is a procedural rule of the kind that ordinarily applies to litigation occurring after enactment of the statute. See *id.* at 31 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."); see also *Matagorda County*, *supra*, slip op. 3696 (Section 1825(b) bars suit to enforce lien that was created before enactment of FIRREA).

Moreover, the explicit temporal limitations in other provisions of the Act through which Congress enacted the provision in question—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 261-262—support application of the statute in accordance with its terms. FIRREA is replete with provisions that include specific temporal limitations on the various powers it grants. See, *e.g.*, FIRREA § 212, 103 Stat. 224-225 (codified at 12 U.S.C. 1821(c)(6)(B) (Supp. IV 1992)) (powers of Office of Thrift Supervision depend upon when receiver is appointed), 103 Stat. 232 (codified at 12 U.S.C. 1821(d)(13)(A) (Supp. IV 1992)) (FDIC bound by "any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment

---

Company, cert. granted, 114 S. Ct. 680 (1994) (No. 93-609) (argued Apr. 26, 1994).

of the [FDIC] as conservator or receiver"). Congress's attention to such temporal limitations throughout FIRREA counsels strongly in favor of full application of those provisions that do not include such limitations. See *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471, 1478 (1993) ("Distinctions among descriptions juxtaposed against each other are naturally understood to be significant.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DOUGLAS H. JONES
Acting General Counsel
ANN S. DUROSS
Assistant General Counsel
RICHARD J. OSTERMAN, JR.
EDWARD J. O'MEARA
Counsel
Federal Deposit Insurance Corporation

MAY 1994

☆ U.S. GOVERNMENT PRINTING OFFICE 1994—301-157/86151